

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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:  
KELLEY AMADEI, :  
:  
Plaintiff, : 17-CV-05967 (NGG)  
:  
v. : 225 Cadman Plaza East  
:  
DUKE, et al., : Brooklyn, New York  
:  
Defendants. : October 25, 2018  
:  
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TRANSCRIPT OF CIVIL CAUSE FOR STATUS CONFERENCE  
BEFORE THE HONORABLE VERA M. SCANLON  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 Bar Council's 1983 Panel on -- for the law clerks. So there's  
2 a three-part series. I didn't get Social Security. I didn't  
3 get habeas. But I got 1983 and Mr. Modafferi is going to be  
4 one of the speakers. So I don't think it has much to do with  
5 anything but I will see him. Hopefully, you can send folks if  
6 you know anybody who wants to learn about 1983 the end of  
7 November.

8 All right. So discovery, we have at 59 defendant's  
9 motion for a protective order; 61, the motion for a stay; 64,  
10 the motion for leave to file documents; and then we have the  
11 corresponding responses.

12 Let me ask what might be a basic question, but in  
13 reading all of this I realized I didn't have clarity on it.  
14 From on the plaintiff's side, there is the APA claim and then  
15 you have the -- what you're saying is a Fourth Amendment  
16 claim, and I was somewhat confused. Because there's a  
17 footnote in your motion to dismiss brief seems to suggest that  
18 this is just about the APA, but then in one of your letters in  
19 the group that I just went over you say, well, there's the  
20 Fourth Amendment claim. What is this -- what's the Fourth  
21 Amendment claim?

22 MR. PICKER: Sure, Your Honor. So there were two  
23 distinct claims that the plaintiffs have brought here. One,  
24 as you mentioned, is an APA claim.

25 THE COURT: Right.

1 MR. PICKER: The other one is a standalone Fourth  
2 Amendment claim that's not subject to the limitations of the  
3 APA. It's an equitable claim as are often brought for  
4 prospective relief under the Constitution. And that's  
5 consistent with our motion to dismiss briefing. I think there  
6 was some confusion on -- as -- on plaintiff's behalf as to  
7 what exactly the defendants were arguing in their motion to  
8 dismiss. And so we wanted to clarify both in that context and  
9 this context that there are two distinct claims, only one of  
10 which depends on the APA.

11 THE COURT: So --

12 MS. OLDS: Your Honor, I'm happy to respond to that.

13 THE COURT: No, I don't want to hear yet.

14 MS. OLDS: Okay.

15 THE COURT: Hold on. I've got to understand what  
16 their view is first.

17 MS. OLDS: Okay.

18 THE COURT: So what does -- what does your Footnote  
19 7 in your brief -- this is Page 19 of the document that's at  
20 33, "The parties agree that there is not another statute that  
21 specifically permits review of the unlawful searches alleged  
22 in the complaint, nor is there a dispute as to the  
23 unavailability of an adequate alternative remedy for the harm  
24 alleged." So what I'm most familiar with is 1983 and then  
25 it's analog, which is incredibly increasingly shrinking,

1 Bivens. So what is -- what's this Fourth Amendment claim when  
2 you're not tied to a statute?

3 MR. PICKER: Sure. So let me just first address the  
4 footnote which I think was directed toward the fact that  
5 within the context of the APA claim, there are certain issues  
6 that you have to prove for an APA claim that are not in  
7 dispute.

8 THE COURT: Okay.

9 MR. PICKER: So that's what that footnote is  
10 addressed to. It wasn't about the two separate claims.

11 With respect to the Fourth Amendment claim, where  
12 the plaintiffs file an action under the Constitution seeking  
13 prospective equitable relief, right, distinct from a 1983  
14 claim where there's --

15 THE COURT: For damages.

16 MR. PICKER: -- seeking damages, right, or a Bivens  
17 claim which also seeks damages for past harm.

18 THE COURT: Okay.

19 MR. PICKER: That's been recognized by the Courts  
20 since Ex Parte Young and its progeny, so for many, many, many  
21 years.

22 THE COURT: Okay. So that's what you're considering  
23 that claim.

24 So then now to the defendant, why do you keep only  
25 talking about the APA?

1 MS. OLDS: Your Honor, there's --

2 THE COURT: This is where I get confused.

3 MS. OLDS: Right. There is no -- you can't have a  
4 constitutional claim against the defendants in their official  
5 capacities. As Your Honor mentioned, if it were a  
6 constitutional claim against defendants in their individual  
7 capacity for damages that would be a Bivens-type of a claim,  
8 and that's not what plaintiffs are alleging. They're alleging  
9 that there's an unconstitutional policy that is in place on  
10 behalf of -- that CBP has this policy, and in fact, that  
11 comports with their complaint.

12 In Paragraph 31, they cite to the APA as the waiver  
13 of sovereign immunity which allows them to bring this claim.  
14 And so the relief that they request is review of this  
15 unconstitutional policy. The only way that you get that is  
16 through the APA. With -- they're alleging that the  
17 identification check was unconstitutional in itself but that  
18 they're entitled to review of it because CBP took final agency  
19 action, which is what's required, in order to get review of a  
20 policy or practice under the APA.

21 So there isn't this sort of standalone -- there's  
22 not a waiver of sovereign immunity for this sort of standalone  
23 Constitutional claim against government officials in their  
24 official capacity. There is not such a claim. So that's why  
25 this is an APA action. That's why the relief that they're

1 requesting is review of this policy or practice. So that's an  
2 APA Claim.

3 THE COURT: So then back to -- so what I was looking  
4 at -- and maybe you can elaborate. This is the -- it was  
5 something that Judge Brodie wrote in a case called Storms v.  
6 USA, and that Case No. is 13-CV-0811. I don't know -- maybe  
7 this is on -- there might be a Westlaw cite or something. I  
8 don't know. But it's the memorandum and order that's filed at  
9 94. And I mean she was talking about Bivens, but she was sort  
10 of making the point that the Government is making which is  
11 there's not a separate claim. And you're suggesting -- you're  
12 saying that Ex Parte Young, et cetera, you can bring it  
13 without any statutory 1983 analog. That's your argument?

14 MS. OLDS: No, Your Honor, that Ex --

15 THE COURT: No, not yours. Theirs.

16 MS. OLDS: Right, Ex Parte Young was -- I mean the  
17 APA was passed in response to Ex Parte Young. So --

18 THE COURT: Yeah, that's why I'm -- a little --

19 MR. PICKER: Your Honor --

20 THE COURT: Go ahead.

21 MR. PICKER: -- absolutely, and this happens all the  
22 time. I mean for instance, if we were -- if we were to  
23 voluntarily dismiss our APA claims that would not in some way  
24 extinguish the basis for jurisdiction for the Constitutional  
25 claims. Courts all the time hear separate Constitutional

1 claims for prospective equitable relief regardless of any  
2 concomitant or concurrent APA claims. The basis for  
3 jurisdiction here is, as included in the complaint, federal  
4 question jurisdiction under 28 U.S.C. 1331. Whether or not  
5 the passage of the APA substituted for Ex Parte Young in terms  
6 of waiver of sovereign immunity is a separate question. But I  
7 think the defendants are confusing those two issues. What  
8 constitutes a waiver of sovereign immunity and what  
9 constitutes a separate independent basis for federal  
10 jurisdiction -- and this happens all the time. And so the  
11 fact that we have two sets of claims here does not in some way  
12 overshadow the fact that the Constitutional claims are  
13 sufficient of themselves.

14 THE COURT: Okay. I just wanted to hear what your  
15 respective thoughts were. I don't think we need to even sort  
16 this out, but having looked at the papers en masse, this is an  
17 issue that's confused in these papers. Whichever way any  
18 other judge is sorting out, you know, that's on the -- that's  
19 with Judge Garaufis, but your briefing is confused in the  
20 sense that you're -- sometimes you're talking at  
21 cross-purposes but I think even if they were just focused on  
22 the APA.

23 So from the Government -- this is my overall problem  
24 with the Government's position -- and I will note you have now  
25 requested this relief multiple times and it hasn't been